INDEX
SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Federal Employers' Liability Act, (35 U. S. Statutes 65; U. S. C. A. Title 45, Sections 51, 53)	2
Statement of the Case	2
Cases cited:	
Hadra vs. Utah Nat'l Bank, 9 Utah 412, 35 P. 508	11
Morgan vs. Child, Cole & Co., 61 Utah 448, 213 P. 117	11
Owens vs. Union Pacific R. Co., 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271	3
Tennant vs. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409	3
Statutes cited:	
Section 104-24-18, Utah Code Annotated, 1943	11
Rule 51 of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723-C	11
SUMMARY OF ARGUMENT	13
ARGUMENT	14
POINT I.	
THIS COURT ON THE REVIEW HERE IS NOT LIMITED TO A DETERMINATION OF WHETHER OR NOT THE SUPREME COURT OF UTAH ASSIGNED CORRECT REASONS FOR ITS HOLDING BUT MAY LOOK TO THE ENTIRE RECORD TO DETERMINE THE VALIDITY OF THE JUDGMENT OF THE TRIAL COURT	14
Cases cited:	
Chicago R. I. and P. R. Co. vs. Wright, 239 U. S. 548, 60 L. Ed. 431, 36 S. Ct. 185	16
Helvering vs. Gowran, 302 U. S. 238, 82 L. Ed. 224, 58 S. Ct. 154	17

Page

Indiana Farmers' Guide Publishing Co. vs. Prarie Farmers' Publishing Co., 293 U. S. 268, 79 L. Ed. 356, 55 S. Ct. 182 18

Owens vs. Union Pacific R. Co., 319 U. S. 715, 87 L. Ed. 683, 63 Sup. Ct. 1271 14

Security and Exchange Commission vs. Chenery Corp., 318 U. S. 80, 87 L. E. 626, 63 Sdup. Ct. 454 17

Yazoo and M. Valley R. Co. vs. Mullins, 249 U. S. 531, 63 L. Ed. 754, 39 Sup. Ct. 368 14

POINT II.

PETITIONERS RECEIVED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND NO PREJUDICIAL ERROR RESULTED FROM INSTRUCTIONS GIVEN 18

A. *Instruction No. 6 was in all respects a correct statement of the law as applied to the facts in this case* ... 19

B. *Instructions Nos. 9 and 20 were correct statements of the law as applied to the facts of this case and were not inconsistent with other instructions* 27

Cases cited:

Atlantic Coast Line R. Co. vs. McIntosh, 114 Fla. 356, 198 So. 92 (1940) 24

Barlow vs. Salt Lake & U. R. Co., 57 Utah 312, 194 Pac. 665 30

Beck vs. Sirota, 42 Cal. App. (2d) 551, 109 Pac. (2d) 419 (1941) 25

Boyd vs. San Pedro, L. A. & S. L. R. Co., 45 Utah 449, 146 P. 282 30

Bucher vs. Equitable Life Assurance Society of the United States, 91 Utah 179, 63 Pac. (2d) 604 30

Chesapeake and Ohio Ry. Co. vs. DeAtley, 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564 25

Chesapeake and Ohio Ry. Co. vs. Proffitt, 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620 25

Chicago R. I. and P. Ry. Co. vs. Ward, 252 U. S. 18, 64 L. Ed. 430, 40 S. Ct. 275 25

Decatur Bank vs. St. Louis Bank, 88 U. S. 294, 21 Wall 294, 22 L. Ed. 560 30

INDEX—Continued

Deery vs. Cray, 72 U. S. 795, 5 Wall 795, 18 L. Ed. 653 30
Easter vs. Virginian R. Co., 76 W. Va. 383, 86 S. E. 37 24
Gildner vs. Baltimore and O. R. Co., 90 Fed. (2d) 635 (2nd Circuit) 24
Grimes vs. Richfield Oil Company, 106 Cal. App. 416, 289 Pac. 245 (1930) 25
Grosvener vs. New York Central R. Co., 343 Mo. 611, 123 S. W. (2d) 173 24
Grosee vs. Terminal R. Assn. of St. Louis, 307 Ill. App. 414, 29 N. E. (2d) 1018 24
Hechler vs. McDonnell, 42 Cal. App. (2d) 515, 109 Pac. (2d) 426 25
Johnston vs. Jones, 66 U. S. 209, 17 L. Ed. 117 30
Kamer vs. Missouri-Kansas-Texas R. Co., 326 Mo. 792, 32 S. W. (2d) 1075 30
Konold vs. Rio Grande Western Ry. Co., 21 Utah 379, 60 Pac. 1021 28
Kurn vs. Stanfield, 111 Fed. (2d) 469 (8th Circuit 1940) 24
Lehi V. R. Co. vs. Doktor, 290 Fed. 760 (3rd Circuit) 22
MacDonnell vs. Southern Pacific Co., 17 Cal. App. (2d) 432, 62 Pac. (2d) 201 24
McGhee vs. Willis, 134 Ala. 281, 32 So. 301 24
McClellan vs. Penn. R. Co., 62 Fed. (2d) 61 (2nd Circuit) 24
Missouri K. and T. Ry. Co. vs. Barber (Tex.), 163 S. W. 116 25
O'Donnell vs. B. & O. R. Co, 324 Mo. 1097, 26 S. W. (2d) 929 24
Ogden Commission Co. vs. Campbell, 66 Utah 563, 244 P. 1029 30
Pacheco vs. New York N. H. and H. R. Co., 15 Fed. (2d) 467 (2nd Circuit) 24
Pierce vs. Spokane International Ry. Co., 131 Pac. (2d) 139, 15 Wash. (2d) 142 24
Roenfranz vs. Chicago R. I. and P. Ry. Co., 140 Iowa 33, 116 N. W. 714 24
Sanders vs. City of Long Beach, 54 Cal. App. (2d) 651, 129 P. (2d) 511 25
Sorenson, et al., vs. Bell, 51 Utah 262, 170 Pac. 72 28
State vs. Trimble, 263 S. W. 840, 304 Mo. 533 28
State vs. Waid, 92 Utah 297, 67 Pac. (2d) 647 28

Page

St. Louis & S. F. Ry. Co. vs. Jeffries, 276 F. 73 (C.C.A. 8, 1921) 24

Tennant vs. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409 24

Wyatt vs. New York O. & W. R. Co., 45 Fed. (2d) 705 (2nd Circuit) 24

Statutes cited:

Section 104-14-7, Utah Code Annotated, 1943 30

Section 104-39-3, Utah Code Annotated, 1943 30

POINT III.

THE SUPREME COURT OF UTAH CORRECTLY HELD AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE 31

1. *Respondent did not choose an unnecessarily hazardous method of proceeding from the cab of Engine 1182 to the tender* 32

2. *Respondent's choice of ways was not in violation of his duty to be in position to give signals to Colosimo* 40

3. *There is no evidence that Respondent disregarded the instructions of Colosimo in getting off Engine 1182* 41

4. *Respondent failed to inform Colosimo that he was going to cross over the draw bars between engines 1182 and 1149* 42

Cases cited:

Fritz vs. Salt Lake and Ogden Gas and Electric Light Company, 18 Utah 493, 56 Pac. 90 39

Mathews vs. Daly West Mining Company, 27 Utah 193, 75 Pac. 722 ..... 37, 38

POINT IV.

THE SUPREME COURT OF UTAH CORRECTLY HELD THAT PETITIONERS WERE NEGLIGENT AS MATTER OF LAW 42

Page

Cases cited:

Baltimore & P. R. Co. vs. Mackey, 157 U. S. 72, 39 L. Ed. 624, 15 S. Ct. 491 43

Brady vs. Southern R. Co., 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232 43

Choctaw O. & G. R. Co. vs. Holloway, 191 U. S. 334, 48 L. Ed. 207, 24 S. Ct. 102 43

Chesapeake and Ohio Ry. Co. vs. Proffitt, 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620 47

Tennant vs. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409 47

Union Pacific Ry. Co. vs. McDonald, 152 U. S. 262, 38 L. Ed. 434, 14 S. Ct. 619 43

Virginian Ry. Co. vs. Stanton, 84 Fed. (2d) 133 48

CONCLUSION 48

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF RESPONDENT

Opinion Below

The opinion of the Supreme Court of the State of Utah is not yet officially reported. It is unofficially reported in 142 Pac. (2d) 649. (Also at R. 103-117).

Jurisdiction

The judgment of the Supreme Court of the State of Utah was rendered October 25, 1943. (R. 117) Petition for re-

hearing was denied on December 27, 1943. (R. 117) Petition for writ of certiorari was filed on March 18, 1944, and was granted on May 1, 1944, 64 Sup. Ct. 1047. Jurisdiction, if present, must come from Section 237 of the Judicial Code as amended.

Statutes Involved

Federal Employers' Liability Act, (35 United States Statutes 65; U.S.C.A. Title 45, Sections 51, 53).

Statement of the Case

Respondent, a hostler's helper, in the employ of Petitioner railway company, while both were engaged in interstate commerce, in attempting to gain a position on top of the tender of one of Petitioners' engines at night (R. 33, 81) in the performance of his duties, was caused to be thrown from the rear of said tender onto the rails in front of its rolling wheels by a sudden and unexpected jerk and movement of two of Petitioners' engines (R. 42, 66, 68) and to thereby suffer the loss of his left leg below the knee. Respondent brought action against Petitioners under the Federal Employers' Liability Act to recover damages for the injuries thus sustained by him in the District Court of the Third Judicial District, in and for Salt Lake County, Utah, and following a trial to a jury, obtained a verdict and judgment in the sum of Thirty Thousand Dollars. Appellant's motion for a new trial was denied by the trial judge and upon appeal to the Supreme Court of the State of Utah, the judgment was affirmed. Petitioners, Defendants below, were charged with negligently and carelessly starting said locomotives without receiving a proper signal and without giving warning by ringing the bell or blowing the whistle, thus causing the injuries complained of. (R. 1 to 6) The Complaint set forth two rules governing the operation of

engines by Petitioners and their employees. (R. 4, 5) The Petitioners admitted in their answer the existence of these rules and that they were in force at the time of the accident. (R. 8) One of said rules, Section 30 of the rules and regulations of the operating department states:

> "The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossings at grade."

The other, Section 2057 of the "Safety Rules", states:

> "An engine bell or whistle warning must be given before engines are moved. Then wait at least one minute."

Respondent testified with respect to his knowledge and the existence of these rules at the time of the accident. (R. 25, 26) Colosimo, the only one of Petitioners' witnesses whose testimony is preserved in the record, likewise testified that he was familiar with them. (R. 101) There was no evidence offered or received to the effect that these rules did not apply to the movement of the engines at the time and place of the accident resulting in Respondent's injury, nor was there any contention that Respondent and the hostler did not consider the rules to be binding on them while they were engaged in the performance of their duties at and prior to the time of the accident. In fact the uncontradicted evidence with respect to the custom and practice followed by hostlers and their helpers in the movement of engines in Petitioners' yards at Grand Junction established as a fact that these rules existed and were uniformly followed. (R. 23, 24 and 25)

In this respect the case at bar differs from *Owens vs. Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, and *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409.

At the time Respondent was injured he was employed as a hostler's helper, aiding and assisting hostler Colosimo. (R. 27) It was the duty of the hostler and his helper to prepare engines for service and to deliver engines from roundhouse to road crews. The hostler is the boss. He runs the engine and sees that the fire and water supply are in proper condition. The helper coals, sands and waters engines, runs the turn table, throws switches and gives signals. (R. 91) The hostler depends on the helper for signals which control the movement of the engines, and in such movements both work together and depend upon each other. (R. 97)

On November 30, 1941, at 11 o'clock P. M., Colosimo and Respondent went to work. (R. 26) Both were experienced hostlers and hostler's helpers and had worked at both positions. (R. 22, 78, 97) It was dark and Respondent had supplied himself with an electric lantern with which to give signals during the hours of darkness. (R. 26) Prior to the accident, Respondent and Colosimo had removed engine No. 1149 from the roundhouse to the cinder pit. (R. 27) The track upon which the accident occurred runs generally east to west. (R. 29) The roundhouse is east of the cinder pits. West of the cinder pits along the same track and to the south is a sand house or sand tower, and further west along the track but to the south is the coal chute. (R. 29, 30)

While engine 1149 was at the cinder pits, engine 1182 was brought from the roundhouse and coupled onto it. Both engines were facing east, with the tender of No. 1182 coupled to the front of 1149. (R. 31) While the fire was being cleaned and built up in engine 1182, Respondent and Colosimo discussed the movements and the service to be given to said engines. (R. 31) Colosimo told Respondent that both engines would be moved by the power of 1149, that 1182 would be stopped at the sand house for sand and

that coal would be taken on both engines, that Bruner was to take care of the sanding and coaling of 1182 and that he, Colosimo, would coal 1149. (R. 31, 45, 50, 51, 70)

Petitioners state in various portions of their brief that Colosimo told Respondent to stay on engine No. 1182, meaning that he was not to dismount from the engine at all. (Brief 4, 8, 12, 22) This is an incorrect statement of the evidence. Respondent stated categorically that he was not instructed to stay on No. 1182 but that his instructions were to sand and coal No. 1182 and Colosimo would coal 1149. (R. 34, 70, 71) All of Colosimo's testimony with respect to this conversation is as follows:

> "Q. • • • Now, will you state what was said between you and Mr. Bruner at that time?
>
> A. I told him that the back engine, 1149, was already sanded, and the 1182 needed to be sanded, and I told him to sand the 1182 and coal 1182 and I would coal 1149 as we went by the coal chute.
>
> Q. Was that all you said to him at that time?
>
> A. Yes, I believe so, I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149." (R. 81)
>
> "Q. (By Mr. Jensen) Mr. Colosimo, at the time you talked with Mr. Bruner, back at the cinder pit, about what you were going to do, did you say anything to Mr. Bruner as to where he should be and stay?
>
> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.
>
> Recross Examination.
>
> Q. (By Mr. Black) All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
>
> A. Yes. sir." (R. 102)

Subsequent to the conversation above related and as soon as the fire had been cleaned, Respondent took a position on the right running board of 1182 and gave Colosimo, who was then in the cab of 1149, a back-up signal with lighted lantern. (R. 32) Colosimo sounded the whistle on 1149 to indicate that he had received the signal (R. 63, 82) and then started the engines backward. When the 1182 reached a point where its sand dome was underneath the sand spout, Respondent gave a stop signal with his lantern, and Colosimo in obedience to the signal stopped the engine. (R. 32) After sand had been taken on 1182, Respondent again gave a back-up signal with his lighted lantern, and Colosimo in response thereto backed the engines westward and stopped them when the 1149 reached a point where its tender was beneath the easterly apron of the coal chute. (R. 33) During this movement Colosimo was looking toward the west and not in the direction of Respondent. This was in accordance with the previous understanding between Respondent and Colosimo. Colosimo was solely responsible for this stop. (R. 34, 63) It is apparent that when this stop was made, the tender of 1182 was an engine length from the first apron at the coal chute. Colosimo proceeded to coal engine No. 1149, this operation taking three or four minutes. (R. 83) At about the time the engines stopped, Respondent entered the cab of engine 1182, checked the fire and water, and after letting the blower run a little bit to finish catching up the fire, turned it off, (R. 33, 60, 65) and this according to his right and duty. (R. 53, 91) It was Respondent's duty to be on the tender of No. 1182 when Colosimo was ready to move, so that he could give a back-up signal, and thereafter a stop signal when the tender of 1182 reached a point beneath the apron at the coal chute. (R. 34, 38, 44, 45) It was his duty to be there and Colosimo expected him to be there. (R. 100) In order to get to the top of the tender of No. 1182, Respondent

climbed out of the cab on the north side (the side away from the coal chute) and walked to the rear of the tender along the north side of the engine.

Respondent's Exhibit "A" (R. 34-A) and "F" (R. 74-A) are rear views of the tender of engine No. 1182. Appellants' Exhibit 3 (R. 62-A) is a picture of the tender of No. 1182 coupled to 1149. The rear end of the tender has attached to it a coupler and two-foot boards, one on either side. The familiar cutting levers extend from both sides of the tender to the couplers being attached to a wooden beam which protrudes approximately six or eight inches from the rear of the steel portion of the tender. Attached to this beam and running along the top of it is a hand-hold. Attached to the under portion of the beam at either end is a stirrup. Just above each foot-board there is a steel step attached to the beam to be used by employees in climbing onto the tender. (R. 75, 76) Attached to the steel portion of the tender and running from a point above the hand-hold to the top, approximately two feet in from the side of the tender, is a steel ladder. (See Exhibits "A", "F".) Respondent intended to climb up this ladder to the top of the tender. In order to do so and in accordance with the usual custom and practice, he climbed onto the wooden beam at the rear of the tender and was in the act of crossing over the coupler to the ladder, when Colosimo suddenly and without signal from the Respondent, and without warning by bell or whistle, and not knowing where or in what position Respondent was at that time started the engines. (R. 42, 82, 83, 89, 100, 101)

The resulting jerk threw Respondent onto the tracks and his left leg was run over at a point below the knee. (R. 41, 42, 43, 65, 69)

In Petitioners' Statement of Facts (Brief, p. 9) it is asserted that Respondent had several safe ways to get to

the top of the tender of 1182 to spot and coal it, without clambering over the draw bars or even dismounting from the engine; and that he did not avail himself of a safe course. It is argued that because of these facts Respondent was guilty of contributory negligence. All of the evidence in the record is to the effect that Respondent could climb to the top of the tender in any way that he saw fit, and that the way chosen by him was the usual, customary and proper way. With respect to the customary and usual manner of climbing to the top of the tender, Respondent testified as follows:

> "Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.
>
> Q. (By Mr. Black) Mr. Bruner, during the time that you were employed by the defendant corporation, did anyone ever give you any instructions concerning leaving or getting down from engines?
>
> A. No, sir." (R. 75, 76)

The only other testimony, (and the only witness to the facts produced by Petitioners) was that given by Colosimo. He testified that hostler's helpers had numerous ways of gaining positions on top of the tender, that some did it one way and some another. He testified that he never gave Respondent any instructions as to how he should get in and out of the engine or of the course he should pursue in gaining a position on top of the tender. He testified (R. 99):

"Q. The fact of the matter is, that was just up to him?

A. Yes, sir."

He further testified (R. 100):

"Q. It is more or less up to the helper what he does?

A. Yes, sir.

Q. You do not pretend to tell the helpers how they should do this part of their work?

A. No, sir.

Q. Nobody ever pretended to tell you how to do it when you were a helper?

A. No, sir."

There is no evidence in the record that the method adopted by Respondent to get to the top of the tender was dangerous or unusual or not customary. There was no evidence that petitioner had ever discouraged or forbidden the practice of crossing over draw bars by rule, regulation, custom or otherwise.

Petitioners conclude (Brief 4) from the fact that it was Respondent's duty to be in a position to give signals to Colosimo that he was required to remain on the right hand or south side of the engine. The signals referred to according to the evidence, were to be given by Respondent from a position on top and rear of the tender of 1182. (R. 44) There is an entire absence of evidence in the record to support the proposition that Bruner was required by circumstances, instruction, practice or rule to be or to remain on the south side of engine 1182.

Petitioner state (p. 4 of their brief) that there is no evidence, suggestion or contention in the record that

Colosimo knew that Respondent was between the engines or intended to go between them. That is true. The evidence is simply to the effect that Colosimo placed the engines in motion, well knowing that he did not know where Respondent was and well knowing that he had received no signal from him and well knowing that he had given no warning of his intended movement by bell, whistle or otherwise. The movement was made in the nighttime, and Colosimo, as he admitted, could see the top of the tender of 1182 from the cab of 1149 (R. 101), he therefore knew at the time the engines were moved that Respondent was not on the tender of 1182, otherwise he could have seen his light.

There was no conflict in the evidence on the question of Petitioners' negligence nor was there any evidence of Respondent's contributory negligence. However, at the conclusion of the introduction of evidence, the trial court submitted both these issues to the jury on proper instructions. In Instruction No. 3 (R. 123) the term "negligence" was fully and accurately defined. By Instruction No. 4 (R. 124) the jury was admonished that it was necessary for plaintiff to prove by preponderance of all the evidence that defendant was guilty of negligence, and that such negligence was the proximate cause of the injuries complained of. By Instruction No. 14-A (R. 127) the provisions of Section 53, Title 45, U. S. C. A., with respect to the diminution of damages by reason of contributory negligence was set forth and the jury was told that while contributory negligence would not defeat recovery, the damages might be diminished by the jury in proportion to the amount of negligence attributable to the injured employee. By Instruction No. 15 (R. 117) given in response to Petitioners' request No. 6 (R. 123), the jury was told that contributory negligence would not bar recovery but that the damages might be reduced in the event the jury found for plain-

tiff, in proportion to the amount of his negligence. There is a suggestion in the dissenting opinion of Justice Larsen (R. 116) that the jury was not adequately instructed on the definition of contributory negligence and that defendants' Requested Instruction No. 5 (R. 118) covering this point should have been given. This request, as a matter of fact, was given, and this request was a part of the charge submitted to the jury. The original request was marked "Given, George A. Faust, Judge." The record shows that no exception was taken by Petitioners for the refusal of the trial court to grant this request (R. 118, 129, 133) and no error was assigned in the Supreme Court of Utah for the failure or refusal of the trial court to grant this request (R. 133, 134, 135)

When the record on appeal reached the Supreme Court of Utah it was discovered that no instruction No. 5 was contained in the transcript of the proceedings. No attempt was made in that Court to correct the record in view of the fact that no exception had been taken and no error assigned for the failure or refusal of the court to grant or give this instruction.[6]

---

[6] Under Utah practice the Supreme Court will not review alleged error in the refusal to grant requested instructions unless proper exception is taken thereto. Section 104-24-18, Utah Code Annotated, 1943, provides:

> "All instructions requested or given shall be filed by the clerk and shall become a part of the judgment roll. Exceptions to the charge or any portion thereof, or to the refusal or modification of any instruction requested, shall be taken at the time the charge is given, or before verdict. No reasons need be given for such exceptions, but the exceptions shall be noted upon the minutes of the court, or by the court reporter, if one is in attendance."

It was held in Hadra v. Utah Nat'l Bank, 9 Utah 412, 35 P. 508, that if no exception is taken either to the giving or the refusal to give instructions requested, no error can be assigned thereon.

See also Morgan v. Child, Cole & Co., 61 Utah 448, 213 P. 117, and Rule 61 of the Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723-C.

The matter of contributory negligence was brought forcibly to the attention of the jury in the forms of verdict submitted by the trial court. By one of these forms (second verdict form) (R. 9) the jury was invited to consider and determine the existence, if any, and the comparative amount of negligence attributable to Respondent.

Under the circumstances the verdict returned by the jury amounted to a finding that Respondent was free from negligence on his part.

It is asserted in Petitioners' Statement of Facts, page 5 of their Brief, that the trial court improperly failed to instruct the jury to make proportionate deductions in damages if they found that Respondent was guilty of contributory negligence. In view of the fact that the Court gave the instruction on this subject as requested by Petitioners, namely instruction No. 15 (R. 117) it is difficult for us to understand or appreciate the virtue of this assertion.

Petitioners state with respect to the decision of the Supreme Court of Utah (Brief p. 7): "It held that the railroad was not entitled to a fair jury trial of those issues because it was not entitled to any jury trial of those issues." This statement is extravagant and misleading. There is nothing in the decision of the Supreme Court of Utah to justify such a statement. The Supreme Court of Utah had before it the record of a trial by jury, where the issues of negligence and contributory negligence had been submitted upon proper instructions and a determination made thereon. The Court held that Petitioners had had a fair jury trial and that the evidence without conflict demonstrated the existence of negligence on the part of Petitioners and that there was no evidence of negligence on the part of Respondent.

SUMMARY OF ARGUMENT

1. THIS COURT ON REVIEW HERE IS NOT LIMITED TO A DETERMINATION OF WHETHER OR NOT THE SUPREME COURT OF UTAH ASSIGNED CORRECT REASONS FOR ITS HOLDING BUT MAY LOOK TO THE ENTIRE RECORD TO DETERMINE THE VALIDITY OF THE JUDGMENT OF THE TRIAL COURT.

Under Point 1, Respondent contends that Petitioners' conception of the scope of the review in this Court is unduly limited. They seek to confine the review to a consideration of the reasons assigned by the Supreme Court of Utah as the basis for its judgment. It is well settled that a correct judgment will not be reversed because the lower Court's reasoning may have been erroneous in some particulars. Respondent contends that the complete record made at the trial court, being now before the Court, should be examined to determine whether or not Petitioners received a fair jury trial and if it should be so determined the judgment should be affirmed even though it may appear that the Supreme Court of Utah assigned erroneous reasons as the basis for its judgment.

2. PETITIONERS RECEIVED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND NO PREJUDICIAL ERROR RESULTED FROM INSTRUCTIONS GIVEN.

Under this point Respondent contends that Petitioners received a fair and impartial trial by jury on the issues raised by the pleadings. That the issues of negligence and contributory negligence were submitted to the jury on proper instructions. That the evidence which was not in conflict was in all respects sufficient to support the verdict.

That instruction No. 6 wherein the Court instructed the jury that Respondent had a right in attempting to mount the tender of engine No. 1182, to assume and to act upon the assumption that the hostler, Colosimo, would not place the engines in motion without proper signal from him nor without giving warning of his intention to move the engines by bell or whistle and that Respondent was justified in relying upon the hostler's obedience to Petitioners' safety rules, was under the pleadings and evidence entirely proper. That instructions No. 9 and 20 which covered the question of damage were not erroneous for the reason that they did not contain an admonition with respect to diminution of damages in the event the jury should determine that Respondent was himself contributorily negligent, in view of the evidence and other instructions covering this point.

3. THE SUPREME COURT OF UTAH CORRECTLY HELD AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Under this point Respondent contends that there is no evidence in the record which proves or tends to prove that he was guilty of negligence, which proximately contributed to the cause of his injuries and that the Supreme Court of Utah correctly held as matter of law that he was not guilty of contributory negligence.

4. THE SUPREME COURT OF UTAH CORRECTLY HELD THAT PETITIONERS WERE NEGLIGENT AS MATTER OF LAW.

Under this point Respondent contends that Petitioners' negligence was the sole, proximate cause of his injuries and that the Supreme Court of Utah correctly held that Petitioners were negligent as matter of law.

ARGUMENT

Point I.

THIS COURT ON THE REVIEW HERE IS NOT LIMITED TO A DETERMINATION OF WHETHER OR NOT THE SUPREME COURT OF UTAH ASSIGNED CORRECT REASONS FOR ITS HOLDING BUT MAY LOOK TO THE ENTIRE RECORD TO DETERMINE THE VALIDITY OF THE JUDGMENT OF THE TRIAL COURT.

Petitioners seek to limit the review in this case to a consideration of the question of whether or not the Supreme Court of Utah stated correct reasons for the affirmance of the judgment in favor of Respondent. While Respondent contends that the reasons given by the Supreme Court of Utah were correct, he also takes the position that the entire record should be considered and that the record clearly and conclusively establishes the validity of the judgment of the trial Court.

The Petitioners rely upon the case of *Owens vs. Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 683, 63 Sup. Ct. 1271, wherein this Court refrained from considering questions which the Circuit Court of Appeals had not determined. We submit, however, that this Court did not intend to thereby overrule the long line of decisions holding that the giving of a wrong reason for affirmance does not require reversal of a correct judgment. *Yazoo and M. Valley R. Co. vs. Mullins*, 249 U. S. 531, 63 L. Ed. 754, 39 Sup. Ct. 368; *Chicago R. I. and P. R. Co. vs. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 S. Ct. 185; *Helvering vs. Gowran*, 302 U. S. 238, 82 L. Ed. 224, 58 S. Ct. 154.

In *Yazoo and M. Valley R. Co. vs. Mullins*, supra, a case tried in a Mississippi State Court under the Federal Employers' Liability Act, the Defendant railroad requested a directed verdict on the ground that there was no evidence of negligence on its part. The request was refused and

verdict was for Plaintiff. Upon appeal, the State Supreme Court refused to consider the question of the sufficiency of the evidence of negligence and affirmed the judgment on the ground that the so-called "prima facie act" of Mississippi applied and relieved Plaintiff of the burden of establishing negligence. This Court had previously held that the "prima facie act" could not be applied under the Federal Employers' Liability Act. Upon writ of error to the Supreme Court of the United States, Plaintiff contended that even though the State Court erroneously applied the act, nevertheless the railroad had not been prejudiced by this error and that the reliance by the State Supreme Court upon the wrong reason should not prevent affirmance. In considering this contention, this Court stated at page 532 of 249 U. S.:

> "It is true generally in cases coming from lower Federal courts that the rendering of an erroneous decision on a particular question, * * * or the assignment by the lower court of an erroneous reason for a right decision, * * * will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby. And this is likewise true of cases coming from state courts. * * * Whether the case comes from a state court or a Federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts."

The judgment was, however, reversed because of clear error in an instruction.

In *Chicago R. I. and P. R. Co. vs. Wright,* supra, the trial court and, on appeal, the Supreme Court of Nebraska held that the case did not come within the Federal Employers' Liability Act but came within a state act. This court

held that the case came within the Federal Employers' Liability Act, but that the Defendant company had not been prejudiced by the erroneous holding of the state courts and the judgment for Plaintiff was affirmed.

In *Helvering vs. Gowran,* supra, this Court stated:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States vs. American R. Exp. Co., 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 569; United States vs. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes vs. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. vs. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; ct. United States vs. Williams, 278 U. S. 255, 73 L. Ed. 314."

In *Security and Exchange Commission vs. Chenery Corp.,* 318 U. S. 80, 87 L. Ed. 626, 63 Sup. Ct. 454, this Court in confining its review of the judgment to the validity of the grounds upon which the commission based its action pointed out that it did not thereby intend to disturb the well settled rule announced by the foregoing decisions. This Court stated the reason for the rule as follows:

> "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

While it does not appear from the opinion in the Owens case, supra, why this Court refrained from going into matters not reached or decided by the Circuit Court of Appeals

it may well have been that Respondent there did not demand or request review of the entire record.

As pointed out by this Court in *Indiana Farmers' Guide Publishing Co. vs. Prarie Farmers' Publishing Co.*, 293 U. S. 268, 79 L. Ed. 356, 55 S. Ct. 182, Respondent must show that although based on untenable grounds the judgment below is correct and should be affirmed, and that this Court in the absence of any such claim will not examine the record to discover grounds upon which to sustain it. Respondent submits that conceding, for the sake of argument only, erroneous reasons were given as the basis for its judgment by the Supreme Court of Utah, nevertheless the judgment is correct in its final analysis and should be affirmed.

Respondent will contend here as he did to the Superme Court of Utah that the judgment of the trial court is correct and that no error was committed in the instructions and further that if there was any error in the instructions, it was not prejudicial for the reason that the evidence established the negligence of petitioners as a matter of law and that there was no evidence of contributory negligence on the part of Respondent.

Respondent respectfully requests an examination and consideration of the whole record to determine whether or not the judgment in favor of Plaintiff was and is correct and that the review here not be limited to a consideration of the opinion of the Supreme Court of Utah only.

Point II.

PETITIONERS RECEIVED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND NO PREJUDICIAL ERROR RESULTED FROM INSTRUCTIONS GIVEN.

The Petitioners contended in the Supreme Court of Utah (R. 133, 134, 135), and likewise here that they did not receive a fair jury trial because of certain claimed errors in Instructions 6, 9 and 20. As heretofore pointed out, the right of Respondent to recover under the evidence was established without conflict and there was an entire absence of proof of negligence on the part of Respondent. These issues, however, were submitted to and determined by the jury, on proper instructions, adversely to the Petitioners, thus leaving for determination the sole question as to whether or not prejudicial error resulted from instructions Nos. 6, 9 and 20. If no prejudicial error was committed in these instructions, then Petitioners' argument that they did not have a fair trial must fall of its own weight.

a. *Instruction No. 6 was in all respects a correct statement of the law as applied to the facts in this case.*

Instruction No. 6 may be found at pages 10 and 11 of the record. By this instruction the jury was told that Respondent had a right in attempting to gain a position on top of the tender of 1182, where his duty required him to be, to assume that Colosimo, his fellow employee, would not place the engines in motion before receiving a signal from Respondent or before giving warning by bell or whistle of the intended movement. The jury was also told that Respondent was not bound to anticipate a violation of Petitioners' safety rules by Colosimo.

Petitioners' complaint respecting this instruction can be summarized as follows: (1) The instruction absolved Respondent from the duty of exercising due care for his own protection. (2) The two rules were not applicable to yard movements. (3) The instruction assumes that Respondent came within the protection of said rules and regulations. (4) The jury was told that a disregard of these rules constituted negligence per se.

Petitioners by answer admitted the existence of the rules and that they were in full force at the time of the accident. Respondent and Colosimo were familiar with these rules and understood them at the time of the accident. The fact that the uniform custom and practice established by Petitioners and their employees of moving engines upon signal and after giving warning of the movement by bell or whistle establishes that these rules had been promulgated for the safety of employees operating engines within yard limits.

Colosimo testified that when a hostler and his helper work together at night, the hostler operates the engine upon signals from the helper, that both work together and depend upon each other. (R. 97) Respondent testified that the helper gives the signals and does the ground work and the hostler operates the engine. He testified that there was a custom and practice followed by the hostlers and hostlers' helpers during all of the time he was employed by Petitioners, that engines were to be moved by the hostler only upon signal from the helper and that after the helper gave the signal, the hostler would answer back by whistle or bell to give warning of the intended movement. (R. 24)

Respondent also testified:

> "Q. Do you know whether or not these signals, both from the hostler to the helper and the helper to the hostler, were used in the movements of engines in the yards at Grand Junction during the time you were working there?
>
> A. Yes, they were in effect, I always used them and worked by them.
>
> Q. Prior to the time this accident occurred, do you recall any occasion when the signals were not used?
>
> A. No, I do not. I always worked according to signals, that is what we have to move by, is signals." (R. 25)

Up to the time of the accident these rules had been faithfully observed by Colosimo, as is indicated by his own testimony, as well as that of Respondent.

Petitioners in defending the proposition that Instruction No. 6 absolved Respondent from the duty of exercising due care must necessarily take the position that Respondent as a matter of right could not rely upon Colosimo to obey the rules and follow the custom, but should have governed his conduct on the assumption that Colosimo might do otherwise.

Railroading is necessarily hazardous. The greatest protection employees have comes from the strict observance of rules, customs and practices designed to promote safety. Employees working together in the movements of engines or trains must be protected by standards of care upon which they can rely. Rules and customs are the means by which these standards are created. The adoption of a rule or custom that signals must be given before engines or trains are moved constitutes a standard which employees may anticipate will be followed. Railroad employees in the performance of their duties must rely for their own safety upon fellow employees and must act upon the assumption that the ordinary hazards of railroading will not be increased by violations of standards established for the expeditious and safe movement of trains, engines and railroad equipment. If railroad employees could not act upon the assumption that fellow employees will not violate these standards, it would be impossible to perform and carry on the great public service of railroading.

Colosimo, except for the time when the engines were stopped at the coal chute immediately prior to the accident, was in the cab of egine 1149. His position was safe and he could not be placed in danger by anything which Respondent could have done or failed to do in the performance

of his duty. Respondent, on the other hand, was moving about on engine 1182 and was giving proper signals not only for the purpose of accomplishing the results outlined to him by Colosimo, but also for the purpose of preserving his own well-being. It was necessary for Respondent to depend upon Colosimo for safety. Colosimo depended upon Respondent for signals and assistance, while Respondent depended upon Colosimo for protection against dangers which might result from failure to observe the standards of care set up by the rules, custom and practice. Respondent was safe and free from danger until Colosimo suddenly, unexpectedly and in violation of the rules placed the engines in motion.

The Supreme Court of Utah in discussing this matter stated (R. 107):

> "This is a case where the parties were members of a working crew working on signals designed for the very safety of that work. Where the accident has been caused by the failure to give such signal the party working in a crew responsible for such omission will not be heard to say that the injury suffered could have been avoided had the injured party conducted himself on the assumption that the signal would not be given; that the consequences of the delict could have been avoided had the injured party, as appears from hindsight, so conducted or positioned himself as to make the delict inconsequential. There are perhaps few instances of accidents in industry where one party injured by the negligence of another might not, had he been warned of the negligence, have placed himself in more advantageous position to avoid its consequences. One of the criteria in determining the standard of care required in industry to fend off a defense of contributory negligence is not one fashioned by the imagination of judges sitting in their chambers but one measured by the conduct and practices of the average experienced workman engaged in that indus-

try in relation to others working with him in their immediate joint enterprise under the system of signals designed for the safety of such parties engaged in the enterprise. The care which a prudent person will exercise not to injure others and that which he will exercise in order to protect himself from the uncontemplated action of others are not necessarily governed by the same circumstances. One for whose benefit such signal is to be given, may while in the conduct of the enterprise, rely on the other to give it; and the latter may not, where the other has acted according to the standard set by the accustomed behavior under such mutual undertakings, urge that greater care would have avoided the consequences of his omission to give the signal."

To instruct that Respondent could assume that the rules, regulations and customs would be followed and obeyed by Colosimo obviously does not take the question of contributory negligence from the jury. The instruction told the jury that, as matter of law, Respondent had a right to rely upon obedience to these standards. In it no reference was made to the conduct of Respondent before, during or after he started to mount the tender of 1182. The instruction merely states that in making the attempt to pass over the couplers and up the ladder to the top of 1182, it was not necessary for Respondent to take precautionary measures to guard himself from danger which could arise only as the result of Colosimo's failure to obey the rules, regulations and customs.

The authorities cited by Petitioners at page 35 of their Brief in support of their contention that Instruction No. 6 absolved Respondent from the duty of exercising due care for his own protection are not in point. None of these cases arose under the Federal Employers' Liability Act, none of them involve railroading or fellow employee relationship,

nor do they relate to any situation even remotely similar to that presented by the record here.

The decisions from state and federal courts in cases arising under the Federal Employers' Liability Act unanimously support the proposition that employees are entitled to rely upon rules and customs which determine the standards of what they must anticipate in the performance of their duties and that they are entitled to act in reliance thereon. *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409; *Kurn vs. Stanfield*, 111 Fed. (2d) 469 (8th Circuit 1940); *Gildner vs. Baltimore and O. R. Co.*, 90 Fed. (2d) 635 (2nd Circuit); *McClellan vs. Penn. R. Co.*, 62 Fed. (2d) 61, (2nd Circuit); *Wyatt vs. New York O. & W. R. Co.*, 45 Fed. (2d) 705 (2nd Circuit); *Lehi V. R. Co. vs. Doktor*, 290 Fed. 760 (3rd Circuit); *MacDonnell vs. Southern Pacific Co.*, 17 Cal. App. (2d) 432, 62 Pac. (2d) 201, certiorari denied, 301 U. S. 688, 81 L. Ed. 1345, 75 S. Ct. 790; *O'Donnell vs. B. & O. R. Co.*, 324 Mo. 1097, 26 S. W. (2d) 929; *Grosvener vs. New York Central R. Co.*, 343 Mo. 611, 123 S. W. (2d) 173; *Pierce vs. Spokane International Ry. Co.*, 131 Pac. (2d) 139, 15 Wash. (2d) 142; *Pacheco vs. New York N. H. and H. R. Co.*, 15 Fed. (2d) 467 (2nd Circuit); *Missouri K. and T. Ry. Co. vs. Barber* (Texas), 163 S. W. 116; *McGhee vs. Willis*, 134 Ala. 281, 32 So. 301; *Roenfranz vs. Chicago R. I. and P. Ry. Co.*, 140 Iowa 33, 116 N. W. 714; *Grosee vs. Terminal R. Assn. of St. Louis*, 307 Ill. App. 414, 29 N. E. (2d) 1018; *Atlantic Coast Line R. Co. v. McIntosh*, 114 Fla. 356, 198 So. 92 (1940); *Easter vs. Virginian R. Co.*, 76 W. Va. 383, 86 S. E. 37.

It has been held by respectable authority that a person is justified in assuming that he will not be exposed to danger which can come only from a breach of duty owed him by another. *St. Louis & S. F. Ry. Co. vs. Jeffries*, 276 F. 73

(C.C.A. 8, 1921); *Beck vs. Sirota,* 42 Cal. App. (2d) 551, 109 Pac. (2d) 419 (1941); *Hechler vs. McDonnell,* 42 Cal. App. (2d) 515, 109 Pac. (2d) 426; *Grimes vs. Richfield Oil Company,* 106 Cal. App. 416, 289 Pac. 245 (1930); *Sanders vs. City of Long Beach,* 54 Cal. App. (2d) 651, 129 P. (2d) 511.

This Court, in cases involving assumption of risk, has recognized the right of employees of railroads to rely upon fellow employees exercising ordinary care and following customary methods in the performance of their work. *Chicago R. I. and P. Ry. Co. vs. Ward,* 252 U. S. 18, 64 L. Ed. 430, 40 S. Ct. 275; *Chesapeake and Ohio Ry. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564; *Chesapeake and Ohio Ry. Co. vs. Proffitt,* 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620. In *Chicago R. I and P. R. Co. vs. Ward,* supra, the Court stated:

> "In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached."

Petitioners maintain that Instruction No. 6 is erroneous for the reason that Rules 30 and 2057 were not applicable to yard movements. The language of the rules without more is proof of the fact that they were enacted for the safety of employees engaged in movements of this type and there is no evidence to the contrary in the record. This contention disregards the uncontradicted evidence that these rules were understood and relied upon by Respondent and Colosimo in the movement of the engines prior to the time

Respondent was injured and that they had become a matter of custom and practice among Petitioners' employees in the yards at Grand Junction. If it be a fact that these rules were not applicable to movements of this type certainly no one was in a better position to prove and establish the fact than the railroad company, and they offered no such proof. As far as the record goes, they leave the rules with the admission in their Answer that they were in full force and effect at the time of the accident. The trial Court in Instruction No. 6 merely advised the jury that Respondent could rely upon rules and regulations pertaining to the movement of engines, and safety of its employees, in force at the time.

Under the pleadings and evidence in this case a finding by the jury that these rules were not applicable to movements of the type being carried on by Respondent and Colosimo at the time of the accident, would be set aside as not supported by pleadings or proof.

Petitioners argue that Respondent was not within the protection of the rule because of the way he chose to get onto the tender of engine 1182.

Respondent's choice of methods in moving from the cab of 1182 to the top of its tender was not a causative factor in the accident; its sole proximate cause was Colosimo's negligence. Certainly there was nothing in the conduct of Respondent which would take from him the protection of these rules and regulations. The rule which required hostlers to hold engines still until receipt of a proper signal from the helper was a rule adopted for the protection of the helper, it affords no protection to the hostler. The rule which required hostlers to give warning by bell or whistle

of intended movements was not adopted for the protection of the hostler, but for the protection and safety of fellow employees and others who might be endangered by the movement. Respondent's safety while on or about the engines, depended on his knowing when the engines were to be moved and he depended upon the signals designed for that purpose to obtain that information. The rules and customs determined and established what those signals and warnings should be.

Petitioners' final criticism of the instruction is that by it the Court told the jury that a disregard of the two rules above referred to by Petitioners would constitute negligence per se. This argument is, to say the least, rather far-fetched. If the instruction were, as a matter of fact, subject to such a criticism, it would not be erroneous here because no prejudicial error could result therefrom. This instruction merely informed the jury that Respondent had a right to rely upon the observance of the rules. It is an instruction which deals solely with the matter of Respondent's right to act on the assumption that his fellow employee would observe the rules and do his duty. It does not state and cannot be construed to state that a mere violation of these rules by Colosimo would entitle Respondent to a verdict.

We respectfully submit that Instruction No. 6 correctly stated the law as applied to this case, that it is well supported by the authorities, and that the trial court did not err in so instructing the jury.

b. *Instructions Nos. 9 and 20 were correct statements of the law as applied to the facts of this case and were not inconsistent with other instructions.*

Petitioners complain of instructions Nos. 9 and 20 (R. 11 and 12) on the ground that the same were given without

any qualification as to deduction on account of Respondent's contributory negligence. Assuming that there was evidence of contributory negligence, the jury was instructed that after they determined the amount of the damage sustained the amount awarded was to be reduced in proportion to the negligence attributable to Respondent. (See instructions 14-A, R. 127; and 15, R. 117, given in response to Defendant's request for Instruction No. 6, R. 123.) These instructions clearly qualify and supplement Instructions No. 9 and No. 20 and when read with the latter instructions embody a correct statement of the law of damages under the Federal Employers' Liability Act.

Petitioners endeavor to circumvent this obvious point by asserting that the instructions given on this subject are contradictory. *Sorenson, et al., vs. Bell,* 51 Utah 262, 170 Pac. 72; *State vs. Waid,* 92 Utah 297, 67 Pac. (2d) 647; and *Konold vs. Rio Grande Western Ry. Co.,* 21 Utah 379, 60 Pac. 1021, cited by Petitioners hold that instructions on a material issue which are inconsistent or contradictory should not be given because it is impossible after the verdict to ascertain which instructions the jury followed or of the influence the erroneous instructions had on their deliberations. There can be no doubt about the correctness of the rule but there can equally be no doubt as to its inapplicability to the instructions complained of in this case.

The instructions given by the trial Court could not possibly have mislead the jury as they correctly stated the law and were neither contradictory nor inconsistent. It is elementary that the law need not be contained in one instruction and that instructions must be read as a whole.

A contention similar to Petitioners' was made in regard to instructions on damages given in the case of *State vs.*

Trimble, 263 S. W. 840, 304 Mo. 533 (Cert. Denied 45 Supreme Court 354, 267 U. S. 598, 60 L. Ed. 806) which was an action under the Federal Employers' Liability Act by a dependent mother to recover damages for the death of her son. The trial Court by Instruction No. 3 told the jury that if they found certain facts required in order to render a verdict for plaintiff, they should assess her damages at such sum as would reasonably compensate her for the loss of pecuniary benefits. Instruction No. 2 directed the jury to make recovery bear the same ratio to full damages as defendant's negligence bore to the full negligence. In holding that the instructions were not contradictory, the Court said:

> "Further, instruction 3 does not authorize a verdict. The two instructions taken together define, somewhat awkwardly, but correctly, the duty of the jury. It must first ascertain how much the plaintiff is damaged, and then deduct from the sum found an amount in the proportion that the negligence of the deceased contributed to the death. If the first is not found, there would be no basis whereon to make the deduction. Instruction 3, instead of authorizing a verdict only directs the jury what it must take into consideration in assessing her damages. There can be no complaint that the direction in that respect is not correct. The jury must consider all those elements and assess the damages accordingly. It is a strained construction to say they must then and there fix the amount of the verdict without considering anything else. One of the meanings of 'assess,' given in Webster and in Bouvier, is 'to value,' 'to fix the value of.' If the words, 'you may ascertain as damages,' were used instead of 'you may assess as damages,' there would be no complaint. If

> miscroscopic inaccuracies like that complained of should work a reversal in every case, no case could be affirmed."

Respondent's position here is supported by *Bucher vs. Equitable Life Assurance Society of the United States*, 91 Utah 179, 63 Pac. (2d) 604; *Barlow vs. Salt Lake & U. R. Co.*, 57 Utah 312, 194 Pac. 665; and *Kamer vs. Missouri-Kansas-Texas R. Co.*, 326 Mo. 792, 32 S. W. (2d) 1075.

It is respectfully submitted that the instructions given by the trial Court were not inconsistent or contradictory but when read as a whole contained a correct statement of the law applicable to the issues and that the cases cited by Petitioners on pages 28, 36 and 37 of their Brief are not in point.

It is elementary that error to justify reversal be prejudicial to the rights of appellant or petitioner. *Johnston vs. Jones*, 66 U. S. 209, 17 L. Ed. 117; *Deery vs. Cray*, 72 U. S. 795, 5 Wall 795, 18 L. Ed. 653; *Decatur Bank vs. St. Louis Bank*, 88 U. S. 294, 21 Wall 294, 22 L. Ed. 560. Section 104-14-7, Utah Code Annotated, 1943, provides that only such errors as effect the substantial rights of the parties can be relied upon for a reversal of a judgment. Section 104-39-3, Utah Code Annotated, 1943, provides that no exceptions shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting. If there were any errors in the instructions given in this case, they are not such as effect the substantial rights of the petitioners and hence could not furnish a basis for reversal of the judgment in favor of Respondent. *Ogden Commission Co. vs. Campbell*, 66 Utah 563, 244 P. 1029; *Boyd vs. San Pedro, L. A. & S. L. R. Co.*, 45 Utah 449, 146 P. 282.

Point III.

THE SUPREME COURT OF UTAH CORRECTLY HELD AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

By Petitioners' specification of errors and argument the decision of the Supreme Court of Utah is attacked on the grounds that the Court erred in holding as matter of law that Respondent was not guilty of contributory negligence and that as matter of law Petitioners were guilty of negligence. They address themselves but incidentally to the fundamental question of whether or not they received a fair jury trial in the trial Court. Petitioners have never contended that the issues of negligence and contributory negligence were not submitted to and determined by the jury, nor have they ever asserted or maintaind that the evidence was insufficient to support the verdict and judgment.

On this point they content themselves by arguing (1) that by Instructions Nos. 6, 9, and 20, Respondent was absolved from contributory negligence; and (2) that by Instruction No. 6 the jury was told that as a matter of law the two safety rules applied to yard movements and that a violation of the rules was negligence per se.

While Respondent has argued (1) that Instructions 6, 9, and 20 were in all respects proper and correctly stated the law as applied to the facts of this case and that the Rules No. 2057 and 30 under the pleadings and evidence applied to yard movements and that Respondent came within their protection, he now contends and submits that the decision of the Utah Court is not erroneous and that its holdings on the matters of contributory negligence and negligence are correct under the pleadings and facts of this case.

Petitioners base their contention that the Supreme Court of Utah erred in holding that there was no evidence of Respondent's contributory negligence on four grounds. We shall discuss them in the order presented by Petitioners in their Brief.

1. *Respondent did not choose an unnecessarily hazardous method of proceeding from the cab of Engine 1182 to the tender.*

There is no evidence in the record that the method adopted by Respondent to get to the top of the tender of 1182 was dangerous or unusual or not customary. Respondent testified at R. 76 that he had crossed over the draw-bars between engines coupled on many occasions and that it was common practice to get off and go up that way. There was no evidence to the contrary and no attempt was made to discredit this testimony. In support of their argument, Petitioners rely upon Exhibits 3 (R. 62A), A (R. 34A), and F (R. 74A). From this silent testimony, Petitioners vigorously contend that the way finally selected by Respondent to accomplish his purpose was dangerous, hazardous, and fraught with great difficulties.

These exhibits speak for themselves. It appears from them that there is a foot board on either side of the draw-bar at the rear of the tender of 1182 and that above each foot board is a metal stirrup. That a hand hold extends horizontally across the rear end of the tender some eight inches above the pin lifter. Respondent at the time of his injury was a young, vigorous railroader. He had been railroading since 1929. (R. 17) For him to mount the tender following the course chosen, it was merely necessary to step onto the foot board at the north rear corner, grasp the hand-hold, above referred to, place left foot in the iron stirrup immediately above the foot board, place right foot and body weight upon the draw bar or beam and take hold of the

ladder with either hand, the ladder being about two feet beyond the draw bar and immediately over the south rail and finally climb up the ladder to the top of the tender. Certainly this does not involve acrobatic skill nor uncommon strength, timing or agility, nor does it involve any difficulties which any man who could qualify for employment as a hostler or hostler's helper could not do with ease. We submit that the extreme difficulties and hazards described by Petitioners in discussing this movement are purely imaginary and do not exist as facts. The Record gives them no support. It is evidently the opinion of Petitioners' counsel that this movement, described as *clammering* over the draw bar, is awkward, clumsy and dangerous, but we doubt that this opinion would find support amongst men whose employment require them to work on and about trains and engines. They were evidently unable to find, amongst their vast number of employees, any who would so testify.

Petitioners suggest a person attempting to cross over the draw bars as Respondent did would be almost certain to fall whether the engines moved or not. From what experience on their part, or from what evidence in the Record, they draw this conclusion we do not know. If such a method of crossing from one side of a train to another or of crossing between engines coupled involves the hazards and difficulties described by Petitioners, it is most remarkable that rules, regulations, or instructions have not been long since adopted forbidding or discouraging employees from doing this. Petitioners made no attempt to prove the existence of any such rules, regulations or instructions and we, therefore, naturally assume that no such rules, regulations or customs exist. In the trial, Petitioners were willing to leave this issue with the jury on Respondent's uncontradicted testimony which appears at R. 75, 76.

Petitioners suggest that the Supreme Court of Utah ignored the preliminary fact that Respondent dismounted from 1182 on the north side and walked back to the rear of the tender before attempting to cross over the draw bar to the ladder. It is difficult to perceive how this fact could be considered as negligence on the part of Respondent in view of the undisputed evidence that he had a free right of choice as to the manner of accomplishing his purpose. (R. 100) It is suggested that there was no reason for Respondent to be on the north side of the engine or at the rear of the north side of the tender. There was a very good reason. It was his duty to mount the tender for the purpose of signalling Colosimo for the next movement. He was in the performance of his duty from the very moment he dismounted from the engine until injured.

Petitioners suggest that there were four safe ways which Respondent could have pursued to accomplish his purpose other than the one he attempted, all of which were safe. This, of course, is but a conclusion based on afterthought and, as pointed out by the Supreme Court of Utah, is not supported by any facts or testimony appearing in the Record.

It is suggested that he could have moved straight back from the cab, climbing up the coal gate of the tender, which is directly back of the gangway, and that this was the most direct and easiest way of reaching his objective. There was no testimony in the Record describing this method, except Colosimo's statement (R. 100) "Some of them crawl up over the gates and get into them". What effort would have been necessary to climb up the coal gate is left to speculation. How the coal gate is constructed, whether or not there are handholds, whether or not there was any particular practice or any particular reason why Respondent should have chosen this method must be determined by guess. Cer-

tainly there is no evidence that Colosimo ever instructed Respondent to use this or any other method or ever intended that he should chose any particular course in getting onto the tender of the 1182.

It is also argued that Respondent could have moved from the cab through the door onto the running board, thence to the top of the boiler, then over the top of the cab to the top of the tender. It would be interesting to know what Petitioners' position would be here if Respondent had pursued this method and the engines had been suddenly placed in motion while he was on top of the engine cab. That he would have been injured or killed under such circumstances is almost a matter of certainty. Since Respondent started from within the cab, this would have been an unusual way to mount the tender, Colosimo stated that this was the usual way only in a case when the hostler's helper was on the running board at the beginning and not when the helper was in the cab at that time. (R. 99, 100) Speaking of this method, Petitioners say that while it was circuitous, it did not involve dismounting from the engine. Wherein Respondent's act in dismounting from the engine contributed in any way to the cause of his injuries does not appear.

It is next suggested that Respondent could have dismounted from the engine on the south side, walked back along the south side of the engine to the ladder, and climbed the ladder to the tender. Petitioners say, "This was not as easy as the first or second methods but it did not involve dismounting from the engine on the wrong side and the crawling over the draw bar." (Br. 15)

What is there in the Record to support the statement that this method *was not as easy* as any other method used or suggested? This likewise is but a speculative assump-

tion. Petitioners recommend this method because it did not involve dismounting on the *wrong side* of the engine. It seems that no one except Petitioners' counsel has determined which was the wrong and which the right side of the engine. If we are to indulge in speculations not supported by evidence it might be well suggested that Respondent thought it safer to dismount from the engine on the side away from the coal chute. The exhibits relied on by Petitioners show that there was no ladder on the south side of the engine. The ladder was at the rear of the tender and between the engines. So long as the choice was up to him, and so long as he was not in violation of any rule, custom or instruction, and was in the faithful discharge of his duties, a court would not be justified in finding, without benefit of testimony or proof, that Respondent dismounted from the "wrong side" of the engine or that he did wrong in any other way or respect in his efforts to gain a position from which to carry on his work.

The fourth method mentioned by Petitioners was that followed by Respondent.

Finally Petitioners suggest that after reaching the rear of the tender on the north side he had a perfectly safe way of crossing over. This was to mount the step on the north side of the pilot of engine 1149, step up to the pilot deck, take hold of the circular handhold, cross the deck, step down to the footstep on the south side, step across the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182.

This movement, of course, involved as much difficulty, required as much strength and agility as crossing over the draw bar, but nevertheless Petitioners, because they find support in this suggestion, make it appear that this was a movement which could be made without difficulty or danger.

Granted that he could have done this, it is submitted he would have been placed in exactly the same danger from a sudden movement as he was when upon the rear of the tender of No. 1182.

While there was some testimony with respect to routes one and two, there was no testimony whatsoever with respect to suggested routes three and five. Any of these ways could have been used by Respondent to gain his desired position, but wherein any of them are more safe or less dangerous, awkward, or clumsy than the route taken by him does not appear.

The principal difficulty with Petitioners' argument is that it is based upon false assumptions and from these false premises, they conclude that Respondent adopted a hazardous way when safe ways were available.

Respondent submits that there is no inherent danger in any of the methods suggested by Petitioners nor in the method used by him, that any vigorous workman who could pass the required physical examination for employment as a hostler or hostler's helper could get on top of the tender by using any of the methods without difficulty or danger to himself as long as the locomotives remained still, but that such a person using any of these methods would be placed in grave danger and peril and perhaps grievously injured or killed if the locomotives were suddenly, unexpectedly and without warning placed in motion while he was so engaged. It clearly appears that the danger and hazard here did not result from the method used but was the direct result of the violation of duty on the part of Colosimo.

The case of *Mathews vs. Daly West Mining Company*, 27 Utah 193, 75 Pac. 722, is illustrative of the proposition that the danger here was born of the negligent act in start-

ing the engines and not of the way pursued by Respondent. In that case the Plaintiff was an employee in an ore mill. The superintendent told him that the mill would be shut down for one half hour and for Plaintiff to look the machinery over while it was down. In making this check, the Plaintiff discovered a loose cap. He procured a candle and a wrench and then laid crosswise over the belt in order to tighten the cap. While thus situated, the mill was suddenly and unexpectedly started and the Plaintiff injured. It was contended by the Defendant that the safe method of tightening this cap was to lie down underneath the belt while someone else held a candle and that Plaintiff thus could have tightened the cap without being exposed to danger, even though the mill was placed in operation while the task was being performed. The testimony, however, indicated that the method used by Plaintiff as well as the method suggested by Appellant was safe as long as the mill was not in operation. There was evidence that it was customary to give a warning when the mill was about to start and that no such warning was given. Defendant contended that inasmuch as the Plaintiff knew of each of the methods mentioned and knew that he could have tightened the loose cap with safety by lying prone underneath the belt, he was guilty of contributory negligence. The Court states:

> "They rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen, * * *"

and continuing:

> "It is also well settled that the negligence of the master is not among the risks so assumed by the servant.

> Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable."

The Court observed that the position of Plaintiff did not become dangerous until the mill was suddenly and unexpectedly started and in commenting on certain decisions cited by the Defendant therein, including *Fritz vs. the Salt Lake and Ogden Gas and Electric Light Company,* 18 Utah 493, 56 Pac. 90, which is cited by Petitioners stated:

> "In neither of these cases was it shown, as in the case at bar, that the position of the servant, which before the accident was safe, was at the time of the injury suddenly made dangerous by the negligent act of the master. It is clear that these cases are not in point."

The cases cited by Petitioners on Page 16 of their Brief have no application here for the reason that Respondent did not choose a dangerous way of performing his duties and for the further reason that the way he chose had no causal connection with the injuries he received. We respectfully submit that there is no evidence showing that the route chosen by Respondent was hazardous or that in making his choice, he violated any duty, custom, rule or instruction. The evidence conclusively establishes that the route chosen by him did not cause or contribute to the cause of the injuries he received.

On this point the Supreme Court of Utah (R. 106) properly found and held:

> "There is no testimony tending to show that it was more dangerous to mount the tender in the manner chosen by the plaintiff. Defendants apparently rely

on Exhibit 3 which is a picture of these two engines coupled together. This picture shows the draw bar and other items relating to the hand holds, etc., on the route which the plaintiff chose. However, we cannot from this picture conclude that the manner chosen was highly dangerous and a method not customarily used. The evidence merely shows that there were several ways by which the plaintiff could have gotten on top of the tender. The manner in which he was to get there was left to his own judgment. The record does not show that the way he chose was the most dangerous way."

2. *Respondent's choice of ways was not in violation of his duty to be in position to give signals to Colosimo.*

Commencing at page 20 of their Brief, Petitioners argue that Respondent violated his duty which required him to be in a proper place to pass signals to Colosimo. Inasmuch as Colosimo moved the engines without signal of any kind from Respondent, it is difficult to understand the virtue of this contention. It was Colosimo's duty to hold the engines still until he received a signal. This he did not do. The movement following the coaling of 1149 was to be made upon signal from Respondent to Colosimo according to the testimony here and of course that signal was to be passed at a time after Respondent reached the top of tender of 1182 and not before. No contention has ever been made that Respondent was slow or that he used an undue amount of time in performance of his duty. No contention is made that it was understood that he was to give the signals from any other position except from the top of the tender. No reasonable contention can be made that there existed any fact or circumstance which justified Colosimo in moving the locomotives without signal, nor that anything which Respondent did or failed to do with reference to the

discharge of his duties in any way justified Colosimo in violating his duty to Respondent.

There is no evidence in this record that it was Respondent's duty to remain in sight to Colosimo. How or in what manner this argument of Petitioners could support the proposition that Respondent not having been on top of the tender to give the signal at the time the engines were placed in motion had any causal connection with the injuries complained of by him does not appear either from Petitioners' argument nor from the Record.

3. *There is no evidence that Respondent disregarded the instructions of Colosimo in getting off Engine 1182.*

On this point the Supreme Court of Utah (R. 106) stated:

> "Nor does the evidence show that Colosimo ordered the plaintiff to stay on Engine 1182. True Colosimo did testify that 'I just told him to stay on 1182. That is what I told him, just to stay on 1182, and I would take care of the 1149'. But it is clear that what he meant by this was merely that plaintiff should confine his work to 1182 and Colosimo would take care of 1149; for in response to the question: 'All you meant by that was that you would take care of 1149 and Bruner would take care of 1182?', Colosimo answered: 'Yes, sir.' This interpretation of this statement is further borne out by the remainder of Colosimo's testimony."

The Supreme Court of Utah properly held that no ininstruction was ever given by Colosimo to Respondent which required him to remain on 1182 in the sense that he was not to dismount therefrom. There was no occasion for such an instruction and the statement made by Colosimo to Respondent was not understood by Colosimo as containing such a direction and Respondent denied that

any such requirement was ever made of him, and a finding to that effect by the Supreme Court of Utah is certainly not erroneous under the undisputed facts.

4. *Respondent failed to inform Colosimo that he was going to cross over the draw bars between engines 1182 and 1149.*

Respondent doubts Petitioners' sincerity in making the argument under their Proposition 4. We are wondering whether or not they would still make such contention if Colosimo and Respondent had been working on a long train. Would counsel expect Respondent to walk, say, twenty or thirty or forty car lengths to inform the engineer or the person operating the engine that he was going to cross over the draw bars? Would any principle of law or justice require such notification as a condition precedent to the establishment of Respondent's discharge of duty to exercise due care? The answer seems self-evident. No rule, custom or practice required Respondent to give such a notice and there is no evidence that Colosimo ever expected any such notice.

We submit that the Supreme Court of Utah correctly held and determined that there was no evidence of Respondent's contributory negligence.

Point IV.

THE SUPREME COURT OF UTAH CORRECTLY HELD THAT PETITIONERS WERE NEGLIGENT AS MATTER OF LAW.

In Point II of their argument, Petitioners complain that the trial Court in Instruction No. 6 told the jury that Respondent had the right to presume and act upon the presumption that Colosimo would obey and not violate rules 2057 and 30, that the instruction was erroneous because the rules were inapplicable. The instruction was given in con-

nection with the pleadings and the evidence offered by the parties.

As heretofore pointed out in detail, the promulgation of the rules and the fact that they were in force at the time of the accident was admitted by Petitioners in their answer. These admissions were unqualified. Respondent and Colosimo, the only employees of the Petitioners who testified with respect to these rules, admitted their familiarity with them. It conclusively appears from evidence in which there is no conflict, that these employees with one exception (the movement made by Colosimo causing Respondent's injuries), fashioned their conduct in the performance of their duty upon these rules and customs which embodied them.

No contention was made in the trial Court by Petitioners that the rules were not applicable to these movements or that they did not govern and pertain to the duties of Respondent and Colosimo. There being no conflict in pleadings or proof on this point the Court was justified in holding as matter of law that the rules applied to yard movements and afforded protection to Respondent. *Union Pacific Ry. Co. vs. McDonald*, 152 U. S. 262, 38 L. Ed. 434, 14 S. Ct. 619; *Baltimore & P. R. Co. vs. Mackey*, 157 U. S. 72, 39 L. Ed. 624, 15 S. Ct. 491; *Choctaw O. & G. R. Co. vs. Holloway*, 191 U. S. 334, 48 L. Ed. 207, 24 S. Ct. 102; and *Brady vs. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

Petitioners contend that it was possible for the jury to find that Colosimo instructed Respondent to stay on Engine 1182, that it was his duty to obey and that under such circumstances it cannot be said as matter of law that Colosimo owed Respondent the duty to anticipate that he, Respondent, would disobey that order and the failure of Colosimo to so anticipate does not constitute negligence. The proposition thus advanced is entirely moot inasmuch as any question of negligence based on Colosimo's failure to anticipate what Respondent might or might not do was not pleaded by Re-

spondent nor submitted to the jury by the trial Court. In this argument, Petitioners entirely overlook the undisputed fact that the matter of Petitioners' negligence as charged by Respondent was submitted to the jury upon proper instructions and determined by it. Petitioners have never questioned, and so far as we know do not now question, the sufficiency of the evidence to support the jury's finding to the effect that they were negligent as charged.

There are, however, two complete answers to this contention: (1) The record does not disclose that any such order was ever given by Colosimo; and (2) the failure of Colosimo to anticipate the breach of such order even if one had been given, did not in whole or in part cause the injuries sustained by Respondent and was never relied upon by Respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case.

Colosimo never did order Respondent to stay on Engine 1182 in the sense that he was not to dismount from it. He only told Respondent what to do, not how to do it. Respondent testified (R. 71):

> "A. That is correct. He just told me the work that had to be done. He did not tell me how to do it."

Colosimo testified on cross examination (R. 99):

> "Q. You never gave Mr. Bruner any instructions as to how he could get in and out of the engine, or what he should do, other than to work with you in this movement?
>
> A. No sir.
>
> Q. You never told Mr. Bruner how he should get down?
>
> A. Down from the gangway onto the other?
>
> Q. You did not tell him to go out of the window,

up on top of the cab, on to the tender; you did not do that at all, did you?

A. No sir.

Q. The fact of the matter is, that was just up to him?

A. Yes, sir."

But let us assume that Colosimo ordered Respondent not to dismount from Engine 1182 at any time. How can this aid the Petitioners on the question of negligence imputed to them by the conduct of their servant Colosimo? The negligence pleaded and relied upon by Respondent, and upon which this action is based, was the failure of Colosimo to give a warning that the engines were to be moved and his failure to hold the engines still until he received a proper signal from Respondent. It was the violation of that duty which gave rise to the cause of action here, it was not the violation of the duty to anticipate what Respondent would do or fail to do. The sudden, unexpected movement of the engines under the circumstances disclosed by the Record, was highly dangerous to Respondent and would have been dangerous to anyone working on or about the engines not expecting or anticipating the movement.

Petitioners complain that Respondent dismounted from Engine 1182 and contend that this was a dangerous act. May we suggest that if Respondent had been off the engine when it started he would not have been injured. His injuries resulted from being on the engine when it was negligently placed in motion. Certainly any instruction given by Colosimo to Respondent requiring him to take care of 1182 while Colosimo did likewise with 1149 would not and should not relieve Colosimo of his duty to give proper warning and to hold said engine still until he received a proper signal from Respondent. This admitted violation of duty on the part of Colosimo was relied upon by Respondent and was

relied upon by the Supreme Court of the State of Utah, and the existence of that duty and its breach by Colosimo is established by evidence not in conflict.

Petitioners suggest that inasmuch as it was Respondent's duty to be in a position to pass signals to Colosimo and that Respondent could not perform that duty while on the north side of the engine, his act in dismounting from the cab of 1182 and walking back to the rear of its tender on the north side thereof preliminary to passing over the draw-bars to the ladder and thence to the top of the tender was in violation of his duty and therefore amounted to negligence on his part, not to be anticipated by Colosimo.

This presents the question as to when and from what position Respondent's duty required him to pass the next signal. As disclosed by the evidence, it was necessary for him to be on the top of the tender of 1182 to pass the signal and to stop the movement of the engines by signal when the tender reached a point beneath the apron at the coal chute. (R. 44, 73) It was never intended that he should perform any of these duties from any other position except the top of the tender. It was never intended that he should pass these signals from the ground, from the cab of 1182, or from the ladder, or from any other position whatsoever except the top and Colosimo knew full well that Respondent was not on the top of the tender when he placed the engines in motion because the top of the tender was in the range of his vision and he knew that he could not see any person, or any lighted lantern thereon. (R. 100)

As the Supreme Court of Utah held, Petitioners' argument on this point is not supported by any evidence in the Record nor by any reasonable inference drawn therefrom.

From the time these engines were moved from the cinder pit up until the time they were placed in motion without

warning or signal by Colosimo, the rules and custom had been followed, the engines had been moved upon signal only and both Respondent and Colosimo had relied and depended upon each other and upon signals and warning. Colosimo, nevertheless, not only placed the engines in motion without a signal from Respondent and without giving any warning whatsoever, but without knowing where or in what position Respondent was at the time. There being no dispute in the evidence, could negligence be any more clearly established?

On this point the Supreme Court of the State of Utah stated (R. 110):

> "If the crew member operating an engine were to move it without signal from his co-worker when he knew the latter was engaged about the train at a point where he could not be seen, we might expect yard accidents to multiply greatly. There is also no dispute concerning the fact that Colosimo did not get a signal from his helper, the plaintiff, to back up so that 1182 could be coaled; nor did he give a whistle signal. It is also admitted that this sudden start caused the plaintiff to fall to the tracks. The hostler and his helper customarily moved the trains by signals between themselves. Colosimo started the train without either getting a signal from the plaintiff or giving a whistle or bell signal himself. It was dark and he could not see the plaintiff nor did he know where the plaintiff was. Moving the train under these circumstances was negligence even apart from the safety rules."

This Court in the case of *Tennant vs. Peoria & Pekin Union R. Co.*, supra, has held that such a movement without a warning is clearly dangerous to life and limb. Accord: *C. & O. Ry. vs. Proffitt*, 241 U. S. 462, 60 L. Ed. 1102, 36 S. Ct. 620, wherein the Court stated:

> "To subject an employee, without warning, to unusual

> dangers in movement incident to the employment is itself an act of negligence."

Petitioners seem to take the position that it was necessary for them to be able to anticipate the precise nature of Respondent's position and danger before they could be held liable for the injuries he received. There need be no such anticipation and the case of *Virginian Ry. Co. vs. Stanton,* 84 Fed. (2d) 133, cited by Petitioners in their brief illustrates this point. In that case the Plaintiff attempted to step out from between two cars when they were unexpectedly put in motion. His right leg caught on a spike or sliver on the rail and his foot was so injured that it was necessary to amputate it. The Court stated:

> "The particular accident which happened in this case was doubtless unusual; but liability is not dependent upon a prevision of the precise event. It is sufficient if some injury may be reasonably expected, unless precaution is taken."

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah affirming judgment of the trial Court in favor of respondent should be affirmed.

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